Supreme Court, U.S.
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No. 03-

# In the Supreme Court of the United States

MICHAEL NEWMAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA.

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether – contrary to the Second Circuit's holding in this case and the holdings of cases from the Seventh and D.C. Circuits, but in keeping with the law of the Third, Fourth, and Ninth Circuits – the constructive amendment of an indictment constitutes per se reversible error under a plain error analysis.

2. Whether, in calculating loss from an offense under the sentencing guidelines based on the difference between the "real" value of the stock unlawfully sold and the price paid by the victim, the court must exclude decline in value attributable to non-criminal, market factors, and whether the burden of demonstrating the magnitude of any such loss was properly placed on the defendant.

## RULE 29.6 STATEMENT

Petitioner Michael Newman is a private individual.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Michael Newman, respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a to 9a) is unreported, as is the judgment of the district court.

## JURISDICTION

The judgment of the court of appeals was entered on September 4, 2003. A timely petition for rehearing and a petition for rehearing en banc was denied on October 16, 2003. App., *infra*, 10a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). On January 8, 2004, Justice Ginsburg granted a 30-day extension, to and including February 13, 2004, of the time within which this petition must be filed.

## STATUTORY AND REGULATORY PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *."

## STATEMENT

In December 2000, petitioner and several of his coworkers were indicted by a grand jury for allegedly committing various acts of securities fraud while employed as stockbrokers by Kensington Wells ("KW"), a New York based securities firm. The two-count indictment charged generally that Petitioner conspired with KW's owners and four other brokers at the firm to engage in a fraudulent scheme to artificially inflate the price of certain "house stocks." Of the three house stocks allegedly manipulated, Petitioner was involved

in only one: the initial public offering ("IPO") for VideoLan, a company that was developing a method of transmitting full-motion video over standard telephone lines. The basic structure of the alleged fraud was that KW's principals would through various illegal means acquire inexpensive shares in companies they intended to take public. The principals would then conspire with the broker-defendants to artificially inflate the price of those shares. The indictment alleged that Petitioner committed various acts in support of the conspiracy, including requiring customers as a condition to purchasing IPO stock to also purchase stock in the aftermarket, a practice called "pre-selling" the aftermarket.

Count One charged that Petitioner and his co-defendants conspired to violate 15 U.S.C. § 78j(b), which makes certain conduct criminal insofar as that conduct violates rules set by the Securities and Exchange Commission, by agreeing to acts in violation of SEC Rules 10b-5 and 10b-6 (17 C.F.R. §§ 240.10b-5, 240.10b-6). In Count Two, the Grand Jury charged a substantive violation of the securities laws under 15 U.S.C. § 78j(b) by alleging that certain conduct solely in relation to the VideoLan IPO violated SEC Rule 10b-5. Count Two ***did not*** charge a violation of Rule 10b-6.

At trial, which consisted mostly of evidence unrelated to acts committed during the short time Petitioner was employed by KW, the prosecution presented evidence and argued that Petitioner's conduct was illegal because it violated Rule 10b-6, although a substantive violation of Rule 10b-6 had not been charged in the indictment. During its summation, the government focused closely on the defendants' alleged pre-selling of the aftermarket, vigorously arguing that pre-selling is "illegal, it is a crime, ***it violates a rule called Rule 10b-6.***" App., *infra*, 11a (emphasis added). During rebuttal, the prosecution again argued that defendants were guilty because their conduct violated Rule 10b-6, "[T]he Judge is going to tell you that pre-selling is illegal. It's not allowed. ***It's Rule 10b-6. The Judge is going to tell you***

***about it. That is a crime.***" App., *infra*, 11a-12a (emphasis added). The government did not contend in its summation that Petitioner's conduct violated Rule 10b-5.

To compound the problem, the district court erroneously instructed the jury that in Count Two the defendants had been charged with violating ***Rules 10b-5 and 10b-6.*** Then, after reading the text of both rules to the jury, the court further instructed the jury that a finding of guilt on Count Two could be predicated upon a violation of Rule 10b-6:

> In order for a defendant to be found guilty of this charge, the Government must prove each of the following elements beyond a reasonable doubt as to that defendant:
>
> First, the defendant used a device and/or scheme to defraud; or (2) made untrue statements of material fact or failed to disclose material facts which resulted in making the defendant's statements misleading; or, (3) engaged in any act, practice or course of business which would operate as a fraud or deceit on any person; ***or (4) violated Rule 10b-6***.

App., *infra*, 14a (emphasis added). The jury acquitted Petitioner on Count One, the only charge implicating Rule 10b-6, but returned a guilty verdict on Count Two.

At sentencing, the district court accepted the government's calculation that losses attributable to Petitioner's conduct totaled $9 million. The court made no factual findings to support that loss calculation. The government's theory, described more fully below, determined loss by calculating the difference between the stock price on IPO day and the price of those same shares in January 1997, when KW closed its offices and the alleged manipulation therefore ceased. Based on this assessment of loss, Petitioner's base offense

level was enhanced by 14 levels under U.S.S.G. § 2F1.1,[1] which applies to losses of between $5 million and $10 million. That enhancement brought Petitioner's total offense level to 27 with a corresponding guideline range of 70-87 months. The district court sentenced Petitioner to 75 months imprisonment.

On appeal, Petitioner contended that the jury instruction, together with the government's vigorous argument to the jury that defendants' acts of pre-selling the aftermarket violated the uncharged Rule 10b-6, amended his indictment in violation of the Fifth Amendment Grand Jury Clause. Applying plain error review (there had been no objection to the instruction), the Second Circuit held that the instruction was not plainly erroneous because Petitioner was on notice that the pre-selling acts relied upon with regard to Count One would be used to prove the 10b-5 violation charged in Count Two. App., *infra*, 5a. It further relied on the ground that the court's instruction on Count Two required the jury to find that the defendants "intentionally engaged in conduct manipulative of the market and deceptive of investors – the essence of a criminal Rule 10b-5 violation – in order to return a verdict against the defendants on Count 2." App., *infra*, 5a.

Petitioner also argued on appeal that the district court's loss calculation – which was based on the decline in the stock price – was unsupportable because it did not separate out loss sustained as a result of a the post-sale deterioration in the legitimate business prospects of VideoLan. At oral argument, Judge Sotomayor recognized that Petitioner had a "potent argument to be raised with respect to the intrinsic value of the stock." App., *infra*, 16a. However, in its decision, the

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[1] U.S.S.G. § 2F1.1 was deleted by consolidation with § 2B1.1, which became effective November 1, 2001. Newman was sentenced under § 2F1.1 because his offense conduct occurred before the effective date of the new provision.

panel ruled that "[n]one of Newman's arguments on appeal with respect to his sentencing were raised in the district court with sufficient specificity to alert the district court to the nature of Newman's objections, and we therefore apply plain-error review." The court then held that because Petitioner had not presented any evidence to aid the court in differentiating between the portion of loss attributable to a decline in VideoLan's business prospects and the portion attributable to the fraud, the district court's calculation was not plainly erroneous. App., *infra*, 8a-9a.

## REASONS FOR GRANTING THE PETITION

### I. THIS CASE IMPLICATES AN IMPORTANT CIRCUIT SPLIT OVER WHETHER A CONSTRUCTIVE AMENDMENT IS PREJUDICIAL PER SE UNDER PLAIN ERROR ANALYSIS.

#### A. The Circuits Are Split As To Whether A Constructive Amendment Automatically Qualifies As Plain Error.

There is no dispute that Count Two of the indictment did not identify Rule 10b-6 as a basis for conviction, and that the district court nevertheless instructed the jury that it did. The court of appeals ruled, however, that "[e]ven if it was error to instruct the jury that it could convict on Count 2 if it found a violation of either Rule 10b-5 or 10b-6 * * * this error would not have been plain error." App., *infra*, 5a-6a. It reached that conclusion because, in its view, "the jury necessarily had to find that defendants intentionally engaged in conduct manipulative of the market and deceptive of investors – the essence of a criminal Rule 10b-5 violation – in order to return a verdict against the defendants on Count 2." App., *infra*, 5a. In other words, the error was not prejudicial, because even

absent the instruction and argument concerning Rule 10b-6, the outcome would have been the same.[2]

That holding implicates a substantial and well acknowledged split among the circuits concerning whether, on plain error review, a defendant needs to show prejudice from a constructive amendment.

In *United States* v. *Olano*, 507 U.S. 725 (1993), this Court established a four-step framework for plain error review. In order to correct an error not objected to in the trial court, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. Further, courts should exercise their discretion to correct only those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736 (quoting *United States* v. *Atkinson*,

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[2] The court of appeals also stated that the error was not "clear or obvious," as required under *United States* v. *Olano*, 507 U.S. 725 (1993) because "[t]he Rule 10b-5 count under which the appellants were convicted incorporated by reference those acts of pre-selling alleged in support of the indictment's charge that the appellants conspired to violate Rule 10b-6, and they therefore had notice that acts of pre-selling in violation of Rule 10b-6 would be used by the prosecution to prove the 10b-5 charge." App., *infra*, 5a. But that is simply another way of saying there was no prejudice. The court's further declaration that "it is not clear or obvious that the indictment charged an offense other than the one the jury instruction and government's summation allowed the jury to convict for" is inexplicable, but appears to be based on a 1966 district court case from New Jersey – *Pappas* v. *Moss*, 257 F. Supp. 345, 364 & n.6 (D.N.J. 1966) – that made vague reference to conduct in violation of 10b-6 in relation to a 10b-5 civil suit, and that could not possibly have put petitioner on notice that in defending against a Rule 10b-5 criminal violation he also had to defend against a violation of Rule 10b-6. As the Second Circuit itself noted, *Pappas* is the only case to have suggested an overlap between Rules 10b-5 and 10b-6. App., *infra*, 5a.

297 U.S. 157, 160 (1936)). The dispute among the circuits involves whether a constructive amendment inherently affects substantial rights.

The Fourth Circuit has held that a constructive amendment per se satisfies the "affects substantial rights" prong of the plain error test and is, therefore, per se reversible. *United States* v. *Floresca*, 38 F.3d 706, 714 (4th Cir. 1994) (en banc) ("[W]e hold that * * * constructive amendments of a federal indictment are error per se, and, under *Olano*, must be corrected on appeal even when not preserved by objection."). The Ninth Circuit has also held that a constructive amendment is per se reversible error, although it has yet to decide whether this holding has survived this Court's opinion in *Olano*. See *United States* v. *Dipentino*, 242 F.3d 1090, 1095 (9th Cir. 2001) (noting that it is uncertain whether the Ninth Circuit's per se reversal rule survives *Olano*, but declining to decide). The Third Circuit holds that a rebuttable presumption arises that a constructive amendment is prejudicial. See *United States* v. *Syme*, 276 F.3d 131, 154 (3d Cir. 2002). In contrast, the D.C., Second and Seventh Circuits place the burden on a defendant to show that a constructive amendment was prejudicial under plain error analysis. See *United States* v. *Lawton*, 995 F.2d 290, 294 (D.C. Cir. 1993); *United States* v. *Vebeliunas*, 76 F.3d 1283, 1291 (2d Cir. 1996) (deciding, based on defendant's concession that his claim had not been preserved, that he must demonstrate prejudice); *United States* v. *Remsza*, 77 F.3d 1039 (7th Cir. 1996) (holding that a constructive amendment must be prejudicial under *Olano*).

The law governing constructive amendments in the context of plain error review is confusing and divided. This Court should grant this petition in order to resolve the division over the reversibility of a constructive amendment in the plain error context.

### B. The Second Circuit's Ruling That A Constructive Amendment Is Not Per Se Reversible Under Plain Error Analysis Conflicts With The Decisions Of This Court.

This Court's holding in *Olano* stands for the proposition that "[n]ormally, *although perhaps not in every case*, the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)." 507 U.S. at 735 (emphasis added). However, *Olano* itself recognized that "[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome * * *." *Id.* Thus, the question is whether a constructive amendment belongs in that category of cases that does not require a showing of prejudice.

The Fifth Amendment Grand Jury Clause guarantees that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *." U.S. Const. amend. V. The Grand Jury Clause prohibits a trial court from altering an indictment:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.

*Ex parte Bain*, 121 U.S. 1, 10 (1887). This Court has noted that "[t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independ-

ently of either prosecuting attorney or judge." *Stirone* v. *United States*, 361 U.S. 212, 218 (1960).

In *Stirone*, this Court recognized the seriousness of a constructive amendment, stating that it "destroyed the defendant's *substantial right* to be tried only on charges presented in an indictment returned by a grand jury." *Id.* at 217 (emphasis added). This Court went on to hold that "[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id.* Courts have relied on this language from *Stirone* to hold that outside of the plain error context, constructive amendments can never be harmless error but rather are *per se* reversible error. See, *e.g.*, *United States* v. *Prince*, 214 F.3d 740 (6th Cir. 2000) (constructive amendment in violation of Grand Jury Clause is *per se* reversible); *United States* v. *Randall*, 171 F.3d 195, 203 (4th Cir. 1999) (same); *United States* v. *Nunez*, 180 F.3d 227, 231 (5th Cir. 1999) (same); *United States* v. *Pigee*, 197 F.3d 879, 887 (7th Cir. 1999) (same); *United States* v. *Stuckey*, 220 F.3d 976, 981 (8th Cir. 2000) (same); *United States* v. *Shipsey*, 190 F.3d 1081, 1086 (9th Cir. 1999) (same).

*Stirone* is thus best read as imposing a constitutional limit on the court's ability to disregard the harm caused by the deprivation of a defendant's Fifth Amendment right to a grand jury. This constitutional limit cannot be changed by a procedural rule (Rule 52(b)) requiring plain error analysis for those claims not objected to in the trial court. The circuits that hold that a defendant claiming a constructive amendment must show prejudice in order to receive relief under plain error review are in conflict with *Stirone* and fail to recognize the category of cases under *Olano* which "should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." 507 U.S. at 735. The question is an important one that warrants this Court's attention.

## II. THE DISTRICT COURT'S LOSS CALCULATION EMBODIES A FUNDAMENTAL METHODOLOGICAL FLAW, AND THE SECOND CIRCUIT ERRONEOUSLY SHIFTED TO PETITIONER THE BURDEN TO DISPROVE LOSS.

Sentencing for white collar crimes is driven almost entirely by the court's calculation of the loss caused by the offense conduct. Because calculating loss can often be a complex and murky undertaking, it is crucially important that the law be clear as to what a defendant must do to place the validity of the government's loss calculation in issue, which party bears the burden of proof on the issue, and what kind of evidence can be employed to calculate loss.

In this case, the government proffered and the district court accepted an utterly irrational method of calculating loss. The court of appeals then rejected the petitioner's challenge to the loss calculation on the ground that the issue had not been preserved and that the petitioner offered insufficient evidence to prove a different figure. This ruling was premised on two fundamental errors: first, the court rejected as inadequate for preservation purposes objections of a kind that have almost uniformly been deemed sufficient; and second, by faulting petitioner's failure to adduce his own specific affirmative loss calculation, the court erroneously shifted the burden of proof on this crucial issue.

### A. The District Court's Loss Calculation Rested On An Irrational Method For Calculating Loss.

Without making any factual findings, the district court simply accepted the government's loss calculation for sentencing purposes. The government's theory was that the defendants' manipulative conduct increased the price of VideoLan shares on IPO day and that customers thereby suffered a loss by paying more than actual value for the stock. In order to determine the amount customers overpaid on IPO

day, August 10, 1995, the government used the price of VideoLan shares 17 months later, in January 1997, when KW closed its doors, as a proxy for the actual value of the stock on IPO day. The government then calculated the difference between the price paid and this alleged "actual" value and multiplied that figure by the number of shares sold by Petitioner to estimate a total of $9 million in losses.[3]

In some situations, loss may be estimated by using the price of stock after revelation of the fraud as a proxy for actual value. See, e.g., *United States* v. *Snyder*, 291 F.3d 1291, 1296 (11th Cir. 2002); *United States* v. *Moskowitz*, 215 F.3d 265, 272 (2d Cir. 2000). However, it goes without saying that the validity of such a loss calculation depends crucially on the reasonableness of presuming that the business prospects of the company that issued the stock stayed relatively steady during the period the price was alleged to have been manipulated. When the period is as lengthy as that here – 17 months – such a presumption becomes utterly irrational. Where that presumption is faulty, calculating loss in this manner can grossly overestimate the actual loss by attributing to a defendant losses caused by external market factors.

Petitioner presented substantial evidence both during trial and at sentencing that in fact rebutted any assumption that VideoLan's business prospects remained static during the time in question. The evidence showed that on the IPO date, the market considered VideoLan stock a "hot" prospect for reasons unrelated to the alleged manipulation. Government witnesses Adam Levy, one of KW's co-founders, and Ed-

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[3] Notably, all of Petitioner's clients were ultimately satisfied with their investment in VideoLan. Each sold his or her stock long before January 1997 for considerable profit. The government's use of this date as a proxy for actual value, therefore, not only overstates the loss but fails to recognize the substantial gains subsequently reaped by the supposed victims of Petitioner's conduct.

ward Stock, a KW employee, testified pursuant to cooperation agreements with the government that they believed VideoLan to have revolutionary technology that would transmit full quality video cheaply over copper phone lines. The company came to KW's offices to demonstrate the product, and it received substantial, positive coverage in the financial press. Money World magazine reportedly stated that VideoLan stock could move to over $75 per share, compared with the $10.50 per share it sold for on IPO day. Additionally, government witness John Nadeau recalled learning that Samsung had signed a three-year contract with VideoLan worth approximately $50 to $70 million. Thus, on IPO day, the business prospects for VideoLan looked bright.

By the time KW closed its doors in January 1997, however, VideoLan had failed to satisfy its contractual obligations to Samsung and had proven unable to produce the product it had promised. Thus, during the period between the IPO and January 1997, VideoLan went from a promising business with a revolutionary new product to a company failing to meet its obligations and lacking any real future potential in the marketplace. This decline in the legitimate business prospects of the company was certainly a major reason for the steep decline in the value of the stock during the relevant period. Yet the district court's calculation wholly disregarded these dramatic developments and erroneously attributed to Petitioner the entire loss. This calculation cannot by any stretch of the imagination be considered a "reasonable estimate of loss given the available information" for sentencing purposes. See U.S.S.G. § 2F1.1, cmt. n.9.

### B. The Court Of Appeals' Rejection Of Petitioner's Challenge To The Loss Calculation Rested On An Impermissible Finding Of Non-Preservation.

At oral argument, Judge Sotomayor acknowledged that Petitioner had a "potent" argument concerning the loss calculation. App., *infra*, 16a. Given this observation, and the un-

tenability of the loss calculation proffered by the government, it is manifest that petitioner's challenge to his sentence would have been found meritorious had the court of appeals not also concluded that the claim had not been adequately preserved below. That conclusion, however, was predicated on two fundamental errors.

*1. Petitioner's Objection to the Loss Calculation Was Fully Adequate to Preserve the Issue.*

The questioning at oral argument was focused primarily on the question whether petitioner's challenge to the loss calculation was sufficiently preserved. App., *infra*, 16a. In response to this questioning, Petitioner's appellate counsel wrote the court specifically identifying the pages in the record where trial counsel made this argument. App, *infra*, 20a. Nonetheless, the court of appeals held that "[n]one of Newman's arguments on appeal with respect to his sentencing were raised in the district court with sufficient specificity to alert the district court to the nature of Newman's objections, and we therefore apply plain-error review." App., *infra*, 8a. This tight-fisted view of preservation was erroneous and ultimately led the Second Circuit to improperly shift the burden of proof to Petitioner to disprove the losses associated with his conduct.

A review of Petitioner's arguments to the district court reveals that the requirement of specificity applied by the Second Circuit in this case is much stricter than the standard applied by other circuits to determine whether a claim of error with regard to sentencing has been preserved for plenary review on appeal. In the district court, petitioner submitted a pre-sentence memorandum of law arguing that the government's loss calculation was faulty because "the government has treated an investment in VideoLan as if the company's product and development potential were valueless. In reality, not only did Michael Newman believe in the stock and the company's potential, but the 'street' also believed in the vi-

ability of VideoLan * * * ." App., *infra*, 17a. The memo went on to note that VideoLan's growth prospects were the main reason for its high valuation in the market. App., *infra*, 17a. Finally, the memo cited *United States* v. *Manas*, 272 F.3d 159 (2d Cir. 2001), for the proposition that "loss calculation in cases of securities fraud ***must take into account the residual value of the security in which the loss is realized***," and argued that the "fatal flaw in the government's loss calculations is that it attributes the entire decline in VideoLan stock price to Newman's pre-selling of the aftermarket. ***In reality, however, the stock price declined because VideoLan's product never realized its potential.***" App., *infra*, 18a-19a (emphasis added).

Under the standards for preserving a claim of sentencing error in other circuits, Petitioner's objections would have been clearly sufficient to avoid plain error review. For example, in *United States* v. *Duncan*, 230 F.3d 980 (7th Cir. 2000), the defendant appealed her sentence on the ground that the calculation of fraud loss attributable to her included impermissible double-counting. In response to the government's contention that the issue was not preserved for appeal, the Seventh Circuit held, "Although the objection was not specifically addressed to the issue of double counting, the district court was certainly aware that Ms. Duncan objected to the Government's calculation * * * because it was overinclusive." *Id.* at 985. Similarly, the Tenth Circuit in *United States* v. *Tisdale*, 248 F.3d 964, 976 (10th Cir. 2001), held that the defendant had adequately preserved his argument against the imposition of a consecutive sentence by simply stating:

> The only request, Your Honor, would be that the Court consider the lower end of the guidelines. And also, he is serving a State sentence, but that the Court make the sentence here concurrent with the State sentence.

The Tenth Circuit held that plenary review was appropriate despite the defendant's failure to note the specific basis for his objection to a consecutive sentence because "he did alert the district court to the issue at hand." *Id.*

Petitioner's objections to the government's loss calculations were more than sufficient under either of these standards. His objections specifically alerted the court that the government's loss calculation included losses unrelated to the fraud. Thus, the district court was aware that Petitioner objected to his calculation because it was "overinclusive." In that way, Petitioner certainly "alert[ed] the district court to the issue."

2. *The Non-Preservation Finding Depended on an Impermissible Shifting of the Burden Of Proof On Loss.*

Having concluded that Petitioner had not preserved the issue below, the Second Circuit reviewed the sentencing issue only for plain error, improperly placing on petitioner the burden to prove the loss. The court stated:

> A district court at sentencing is not required to "determine[] loss with precision[, it need] only make a reasonable estimate of the loss, given the available information." U.S.S.G. § 2F1.1 cmt. 9 (1998). Newman presented no evidence to the district court to aid it in differentiating between that portion of the decline of the company's stock price attributable to a decline in its business prospects, if any, as opposed to market manipulation. Whether or not such evidence, had it been presented, would have affected the analysis, the district court calculation based on the evidence before it was not plainly erroneous.

App., *infra*, 8a-9a.

That analysis is fundamentally flawed. While there may not need to be "precision," and while the government may carry its burden of proof by adducing an estimate that, if not perfect, is nevertheless "reasonable," it hardly follows that the government can simply put forward some untenable theory that produces an inflated but wholly unrealistic loss figure and then sit back and compel the defendant to shoulder the burden of proving an alternative figure. On the contrary, the government bears the burden in sentencing of proving loss by a preponderance of the evidence. See *United States* v. *Watts*, 519 U.S. 148, 156 (1997) ("The Guidelines state that it is appropriate that facts relevant to sentencing be proved by a preponderance of the evidence and we have held that application of the preponderance standard at sentencing generally satisfies due process." (internal citation omitted)); *United States* v. *Reese*, 33 F.3d 166, 174 (2d Cir. 1994) ("It is well settled that at sentencing the government must establish by a preponderance of the evidence those disputed facts that are material.").

Even if a defendant is obligated to object to the government's calculation in order to alert the district court that there is an issue for its consideration, such an obligation cannot extend to making the defendant attempt affirmatively to prove the loss. If the government has failed to carry its burden to provide a reasonable estimate of loss by a preponderance of the evidence, then its calculation may not be utilized regardless of the nature and extent of any evidence proffered by the defense.

Here, petitioner pointed out in the trial court and the court of appeals that the government's loss calculation improperly included losses due to market factors. That should have been found sufficient to present and preserve the issue, and to require the government to put forward some basis for determining loss that was not so manifestly irrational as the one on which it relied. That petitioner did not also introduce evidence that the court could use to determine loss against him

is not relevant given that the burden to establish loss lies with the government. The Second Circuit improperly shifted to petitioner the burden to disprove loss.

The standard of review on appeal is an important issue to all appellants, and trial counsel need clearly defined rules for preservation in order to ensure that they adequately protect their client's rights. Moreover – especially in an era of increased prosecutorial attention to financial crimes – clear guidance as to the proper method of calculating loss in stock fraud schemes would be of great value to the lower courts.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW L. FREY
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ANDREW H. SCHAPIRO
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*New York, NY 10019*
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FEBRUARY 2004

# APPENDIX

## APPENDIX A

**[DECISION BELOW – UNREPORTED]**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## SUMMARY ORDER

**THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 4th day of September, two thousand and three.

Present:

HON. ROBERT D. SACK,
HON. SONIA SOTOMAYOR,

Circuit Judges,

HON. GEORGE B. DANIELS,*

District Judge.

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UNITED STATES,

Appellee,

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* Of the United States District Court for the Southern District of New York, sitting by designation.

- v -

Nos. 02-1469, 02-1471, 02-1497 02-1498, 02-1500

MICHAEL NEWMAN, STEVEN ORANDELLO, STEVEN JAROSS, JAMES MCINERNEY and VICTOR DIFRISCO,

Defendants-Appellants.

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Appearing for Appellants:

GERALD B. LEFCOURT, Gerald B. Lefcourt, P.C. (Richard Ware Levitt, Diarmuid White, of counsel), New York, NY, for Defendant-Appellant Michael Newman.

MICHAEL F. BACHNER, Bachner & Herskovits, P.C., New York, NY., for Defendant-Appellant Steven Orandello.

SALLY BUTLER, Steve Zissou & Associates (Steve Zissou, of counsel), Bayside, NY, for Defendant-Appellant Steven Jaross.

ELIZABETH FOX-MCDONOUGH, The Law Offices of Edward P. Jenks, Esq. (Edward P. Jenks, of counsel), Mineola, NY, for Defendant-Appellant James McInerney.

JOHN S. WALLENSTEIN, Mineola, NY, for Defendant-Appellant Victor DiFrisco.

Appearing for Appellee:

CAROLYN POKORNY, Assistant United States Attorney (Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York, David C. James, Assistant United States Attorney, of counsel), Brooklyn, NY.

Appeal from judgments of the United States District Court for the Eastern District of New York (Leonard D. Wexler, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments be, and they hereby are, AFFIRMED.

The appellants in this appeal were convicted by a jury of violating Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) & 78ff(a), by willfully violating Securities Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5. The appellants appeal their convictions, and one appellant, Newman, also appeals his sentence.

The fraud of which the appellants were accused involved what is colloquially known as a "pump and dump" scheme, in which a person artificially raises the market price of a security in which he or she has an interest (the "pump") so that he or she can sell the security at a profit (the "dump"). The appellants were stock brokers employed by Kensington Woods, a now-defunct brokerage, which fraudulently manipulated the market for securities in companies whose initial public offerings it had underwritten.

The defendant brokers were charged with one count of conspiring to violate Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) & 78f(a), by violating Securities Exchange Act Rules 10b-5 and 10b-6 (rescinded Jan. 7, 1997), and one count of violating Section 10b by violating Rule 10b-5. Each defendant was acquitted of the first count, and convicted of the second.

**[CONSTRUCTIVE AMENDMENT & INEFFECTIVE COUNSEL]**

During summation, the government argued that the appellants were guilty on the second count because they had violated Rule 10b-6. The jury was instructed that it could convict if it found that the appellants had violated Rule 10b-6

for the purpose of manipulating the market. On appeal, the appellants argue that the instruction and summation constructively amended the indictment to permit the jury to convict if it found that the appellants had violated Rule 10b-6, when they had only been indicted on the second count of violating Rule 10b-5. A constructive amendment "occurs when the government's presentation of evidence and the district court's jury instructions combine to 'modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury.'" United States v. Wozniak, 126 F.3d 105, 109 (2d Cir.1997) (quoting United States v. Vebeliunas, 76 F.3d 1283, 1290 (2d Cir.1996)). Because the appellants failed to object on this ground at trial, we review the claim for plain error. Fed.R.Civ.P. 52(b).

> The framework of the analysis for plain error pursuant to Rule 52(b) is the four-pronged test set forth in United States v. Olano, 507 U.S. 725, 732 (1993). Before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

United States v. Thomas, 274 F.3d 655, 667 (2d Cir.2001) (in banc) (citations, internal quotation marks, and alterations omitted).

While it is "clear" that an indictment may not be constructively amended without violating the grand jury clause, see, e.g., Stirone v. United States, 361 U.S. 212, 217, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), applying this established rule to the particular facts here does not result in an error that

was either clear or obvious. The Rule 10b-5 count under which the appellants were convicted incorporated by reference those acts of pre-selling alleged in support of the indictment's charge that the appellants conspired to violate Rule 10b-6, and they therefore had notice that acts of pre-selling in violation of Rule 10b-6 would be used by the prosecution to prove the 10b-5 charge. Violations of Rules 10b-5 and 10b-6, moreover, are violations of the same criminal provision, Section 10b of the Securities Exchange Act of 1934, and carry the same sentence. See 15 U.S.C. § 78ff(a); U.S.S.G. § 2B1.1 (2002); id. § 2F1.1 (1998); Goldstein v. Regal Crest, 62 F.R.D. 571, 574 (E.D. Pa. 1974). Parenthetically, the only case to date of which we are aware that has addressed the question of whether Rule 10b-5 is violated when a defendant violates Rule 10b-6 with the intent of manipulating the market held in the affirmative. See Pappas v. Moss, 257 F. Supp. 345, 364 & n. 6 (D.N.J.1966) (citing SEC v. Scott Taylor & Co., 183 F. Supp. 904, 906-09 (S.D.N.Y.1959)). We therefore conclude that it is not clear or obvious that the indictment charged an offense other than the one the jury instruction and government's summation allowed the jury to convict for.

Further, the charge also required the jury to find that the conduct was done with the purpose of defrauding buyers or sellers of securities. Because the district court charged the jury that it had to find an intent to defraud to convict on Count 2, and also told the jury that in "the context of market manipulation, to defraud means intentional or willful conduct that is designed to defraud or deceive investors by artificially controlling or fraudulently affecting the price of securities," the jury necessarily had to find that defendants intentionally engaged in conduct manipulative of the market and deceptive of investors -- the essence of a criminal Rule 10b-5 violation -- in order to return a verdict against the defendants on Count 2. Even if it was error to instruct the jury that it could con-

vict on Count 2 if it found a violation of either Rules 10b-5 or 10b-6, then, this error would not have been plain error.

Appellants' alternate contention, that their counsel were constitutionally ineffective for failing to object to the inclusion of Rule 10b-6 in the jury, charge fails for similar reasons. We have held that counsel is ineffective for failing to object to a jury instruction when "precedent supported a 'reasonable probability' that a higher court would rule in [the] defendant's favor," Bloomer v. United States, 162 F.3d 187, 193 (2d Cir.1998), but there is no such precedent here. The appellants have not, under the first prong of Strickland v. Washington, 466 U.S. 668, 688-89 (1984), defeated the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," or established that counsel's performance "fell below an objective standard of reasonableness." Even if failing to object to the erroneous inclusion of Rule 10b-6 in the charge on Count Two fell below an objective standard of reasonableness, moreover, because the charge required a showing of intent to manipulate the market, we conclude that no showing of prejudice has been made under Strickland' s second prong, "that there is a reasonable probability that, but for counsel's [allegedly] unprofessional errors, the result of the proceeding would have been different." Id.

**[FAILURE TO INSTRUCT JURY THAT CERTAIN ACTS WERE NOT CRIMINAL]**

The appellants contend that the district court erred in declining to instruct the jury that certain regulatory violations were not violations of Rule 10b-5. The district court ruled that since the prosecution had contended that the violations were "part of the plan and scheme of manipulation . . . the government may bring [them] out." The court later instructed the jury that to convict, it had to find "intentional or willful conduct that [was] designed to defraud or deceive investors by artificially controlling or fraudulently affecting the

price of securities." Defense counsel had an opportunity to argue their position that the regulatory violations were not manipulative of the market to the jury. We conclude that there was no error in the district court's ruling.

**[PREJUDICIAL CLOSING ARGUMENTS]**

The appellants argue that they were prejudiced by the government's summation. To require reversal, summation comments must "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." Gonzalez v. Sullivan, 934 F.2d 419, 424 (2d Cir.1991) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) (alteration in original)).

Most of the comments complained of were entirely proper, either independently or as appropriate responses to arguments made by the defense. While it was arguably improper for the prosecutor to refer to defense counsel's argument that violating Rule 10b-6 did not constitute market manipulation as a "neat little trick," "total bunk," and requiring "audacity," since the appellants failed to object to these comments at trial, they are grounds for vacating a conviction only if they constituted "flagrant abuse." United States v. Rivera, 22 F.3d 430, 437 (2d Cir.1994) (citing United States v. Ortiz, 857 F.2d 900, 904 (2d Cir.1988), cert. denied, 489 U.S. 1070 (1989)). We do not think the comments complained of can properly be described as flagrant abuse.

It was also improper as to Newman, Orandello and McInerney for the government to point out to the jury that those appellants had previously worked for another brokerage which was notorious for engaging in schemes similar to the one charged, because that evidence had only been admitted against DiFrisco and Jaross. Any prejudice caused by the comment was cured by a limiting instruction given by the district court.

**[SUFFICIENCY OF THE EVIDENCE]**

Jaross, McInerney and DiFrisco argue that the evidence introduced at trial was insufficient to sustain their convictions. An appellant raising such a claim carries the "heavy burden," United States v. Scarpa, 913 F.2d 993, 1003 (2d Cir.1990), of establishing that "reasonable jurors must necessarily have had a reasonable doubt as to [his or her] guilt." United States v. Brown, 776 F.2d 397, 402 (2d Cir.1985).

The government introduced direct evidence that Jaross, McInerney and DiFrisco either pre-sold stock or misrepresented the stock to customers and testimony regarding their knowledge of and participation in the "no net sales" policy and special secret incentives given for selling the company's shares to investors. Upon review of the evidence introduced at trial, we cannot conclude that a reasonable jury must necessarily have had a reasonable doubt regarding any of the appellants' guilt.

**[LOSS ATTRIBUTABLE TO NEWMAN]**

None of Newman's arguments on appeal with respect to his sentencing were raised in the district court with sufficient specificity to alert the district court to the nature of Newman's objections, and we therefore apply plain-error review. See Unites States v. Sofsky, 287 F.3d 122, 125-26 (2d Cir.2002) (plain-error review applies to review of sentencing errors not objected to, with exceptions not relevant here).

Newman contends that the district court improperly calculated the loss attributable to him for sentencing purposes. The district court calculated the difference between the price of the stock during the fraud and its price after the fraud ended and multiplied that sum by the number of shares attributable to Newman.

A district court at sentencing is not required to "determine[ ] the loss with precision[, it need] only make a reasonable estimate of the loss, given the available information." U.S.S.G. § 2F1.1 cmt. 9 (1998). Newman presented no evi-

dence to the district court to aid it in differentiating between that portion of the decline of the company's stock price attributable to a decline in its business prospects, if any, as opposed to market manipulation. Whether or not such evidence, had it been presented, would have affected the analysis, the district court calculation based on the evidence before it was not plainly erroneous.

Newman also argues that he is not responsible for manipulation of the market by Kensington Woods' principals. The government introduced evidence indicating that even if Newman was not aware of all of the methods used to manipulate the price of the securities, he was aware that manipulation was going on. The losses caused by those methods of market manipulation are attributable to Newman for sentencing purposes. See U.S.S.G. § 1B1.3(a)(1)(B) (1998).

Newman also argues that Kensington Woods bore some of the loss when it was forced, as the market-maker, to purchase the company's stock back from customers who wanted to sell. As we have just noted, a district court at sentencing is not required to "determine[ ] the loss with precision[, it need] only make a reasonable estimate of the loss, given the available information." U.S.S.G. § 2F1.1 cmt. 9 (1998). Because Newman introduced no evidence supporting his contention that Kensington Woods bore a portion of the loss, the district court's estimate of the loss, which did not take into account re-purchases by the brokerage, was reasonable.

Newman also argues that he should not have to pay $600,000 in restitution to a customer who suffered a portion of his loss after Newman left Kensington Woods. The customer's loss is attributable to Newman because he personally convinced that customer to purchase the stock.

For the foregoing reasons, the judgments of the District Court are hereby AFFIRMED.

## APPENDIX B

### [ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC – UNREPORTED]

### UNITED STATES COURT OF APPEAL
### FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16 day of October two thousand three.

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USA

v. Dkt No: 02-1469

Tacher (Newman)

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A petition for rehearing and a petition for rehearing en banc having been filed herein by the appellant Michael Newman.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk
by /s/ Laura Bass Penn
Laura Bass Penn
Motions Staff Attorney

## APPENDIX C

### [EXCERPTS FROM GOVERNMENT'S SUMMATION AND REBUTTAL]

*[Government's Summation, Trial Transcript pp. 1543-44]*

First of all, let's talk about pre-selling the aftermarket and tie-ins. You know what that is. You heard about it again and again.

What is supposed to happen in an IPO is that all the IPO units are distributed to the public. Then the stock begins to be traded on a market and the laws of supply and demand then determine what the price of that stock is going to be. It can go up and it can go up.

No broker, nobody, is supposed to solicit people to buy in the aftermarket prior to a stock going public, prior to the IPO units being completely distributed, and you know that's exactly what these defendants did.

It's illegal, it is a criminal crime, it violates a rule called Rule 10(b)(6). You heard about it back when the securities expert Rob Lowry testified and you heard about it from Ed Stock, Eddie Lawrence and Adam Levy who told you that you can't do tie-ins and you can't do pre-selling. You cannot mention the aftermarket, solicit people to buy in the aftermarket, prior to the stock going public.

*[Government's Rebuttal, Trial Transcript p. 1636 ]*

Ladies and gentlemen, you all figured it out, you're not stockbrokers, you're not in a business. After I asked witness after witness the same thing, what's the effect of pre-selling on the aftermarket price of the stock, you all figured it out. You were all sick of me asking witness after witness the same thing. The witnesses all told you it, and that's what the fact is, and the Judge is going to tell you that pre-selling is

illegal. It's not allowed. It's Rule 10(b)(6). The Judge is going to tell you about it. That is a crime.

## APPENDIX D

### [EXCERPTS FROM JURY INSTRUCTIONS]

*[Jury Instructions, Trial Transcript pp. 1671-1674]*

Count two, securities fraud.

The defendants are charged in court two of the indictment with securities fraud in violation of Section 78j(b) of Title 15 of the United States Code, and Rules 10(b)(5) and 10(b)(6) of the Securities and Exchange Commission promulgated thereunder.

Section 78j(b) provides, in relevant part, as follows:

It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange (b) to use or employ in connection with the purchase or sale of any security any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Securities and Exchange Commission may prescribe.

Rule 10(b)(5) provides, in relevant part, as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange to employ any device, scheme or artifice to defraud; (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in light of the circumstances under which they were made not misleading; or, (c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

Rule 10(b)(6) provides, in relevant part, as follows:

It shall be unlawful for any person who is a broker or other person who has agreed to participate or is participating in a particular distribution of securities, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, either alone or with one or more other persons, to attempt to induce any person to purchase any security which is the subject of distribution, or any security of the same class and series, or any right to purchase such security until after he has completed his participation in such distribution.

In order for a defendant to be found guilty of this charge, the Government must prove each of the following elements beyond a reasonable doubt as to that defendant:

First, the defendant used a device and/or scheme to defraud; or, (2) made untrue statements of material fact or failed to disclose material facts which resulted in making the defendant's statements misleading; or, (3) engaged in any act, practice or course of business which would operate as a fraud or deceit on any person; or, (4) violated Rule 10(b)(6).

Second, the defendant's acts were in connection with the purchase or sale of Videolan stock.

Third, the defendant used the mail or the telephone in connection with these acts; and,

Fourth, the defendant acted for the purpose of defrauding buyers or sellers of securities.

To defraud someone means to make a statement or representation which is untrue and known to the defendants to be untrue, or knowingly to fail to state something which is necessary to make other statements true and which relates to something important to the purchase or sale.

It is not necessary that the defendants made a profit or that anyone actually suffered a loss.

Alternatively, in the context of market manipulation, to defraud means intentional or willful conduct that is designed to defraud or deceive investors by artificially controlling or fraudulently affecting the price of securities.

If you find as to any defendant that the Government has failed to prove each of the elements of court two beyond a reasonable doubt, you must find the defendant not guilty.

## APPENDIX E

### [EXCERPT FROM TRANSCRIPT OF SECOND CIRCUIT ORAL ARGUMENT]

MR. LEFCOURT: I would like to take just one minute on the sentencing point before I sit down, which I intend to…

JUDGE SACK: One minute.

MR. LEFCOURT: Okay, the appellant has been sentenced to 75 months, based on a calculation of -- INAUDIBLE --, that, in effect, says, even though he made sales right after the IPO became public and left the firm a few months later, 17 months later, Kensington Wells goes out of business, and the value of the stock…

JUDGE SOTOMAYOR: Mr. Lefcourt …

MR. LEFCOURT: …at that point was what…

JUDGE SOTOMAYOR: …how was the trial Judge supposed to know what you were arguing from what was presented to him at sentence? I don't disagree that there's a potent argument to be raised with respect to the intrinsic value of the stock, but how is the Judge supposed to know that? Is he a mindreader now?

## APPENDIX F

### [EXERPTS FROM DEFENDANT'S PRE-SENTENCE MEMORANDUM OF LAW]

*p.1:*

By way of summary, defendant Newman's position is that the government's new loss calculation is as faulty as its previous loss calculation. That is, the $9,000,000 loss calculation is predicated upon an arbitrary assignment of the value of Videolan stock at the time Kensington Wells closed its doors. By doing so, the government totally ignores the fact that Newman's clients sold their holdings in Videolan long before Kensington Wells closed its doors and all of Newman's clients handsomely profited from their investment in Videolan. Furthermore, the government has treated an investment in Videolan as if the company's product and development potential were valueless. In reality, not only did Michael Newman believe in the stock and the company's potential, but the "street" also believed in the viability of Videolan: That is the reason the stock was broadly traded for a significant period of time and enjoyed the support of numerous stock analysts. The fact that Newman pre-sold the aftermarket in Videolan, the basis for his conviction, does not correspondingly establish that Videolan had no value.

*p.3:*

For example, Newman always trumpeted his belief that Videolan presented a solid investment opportunity for his clients. Proof of the accuracy of that evaluation is the fact that three months after IPO day, Videolan entered into a widely reported multimillion dollar development contract with a major corporation. Indeed, John Nadeau, a witness at the trial and customer of defendant Newman, acknowledged his satisfaction with Newman's recommendation to purchase Videolan, to wit:

Q: did you see come across the ticker on November 13, 1995, a report that Videolan reported a three year deal with Samsung Corporation that was worth 50 to $70 million for the company?

A: I remember seeing those releases on the Internet, yes. (Tr.463)

**********

Q: Well, in November, on November 13, 1995, can you put yourself back to that time?

As you sit here now, you were one pretty happy fellow, weren't you, with regard to Videolan?

A: Yes.

Q: And, in fact, since you learned, not from Mike, but on the Internet, that the company had tied down a major deal with the Korean commercial giant, that the likelihood that the stock price would appreciate was pretty decent, right?

A: It was doing well.

Q: So you certainly had no complaints about anything, right, at that point?

A: No. (Transcript at 463-464)

*pp.5-6:*

In *U.S. v. Manas*, __ F.3d __, 2001 WL 1497212 (2d Cir. November 27, 2001), the Second Circuit held, in substance, that loss calculations in cases of securities fraud must take into account the residual value of the security in which the loss is realized. The reasoning in *Manas*, as applied to this case, would lead one to conclude that the residual value of the Vidiolan stock on the date Newman's clients sold their stock must be taken into account in determining whether they sustained any loss. As applied to Newman's clients, the sales

price of Videolan was far higher than the purchase price. It would therefore seem logical, based upon the reasoning employed in *Manas*, that no losses were sustained by Newman's clients.

We also disagree with the government's analysis that the *Manas* case compels a determination that losses are to be calculated in this case by the "intended increase in the price of the (rigged stock) multiplied by the number of shares at stake." In the *Manas* case the increase in the price of the rigged stock was due solely to the defendant's conduct. Here, the increase in the price of Videolan stock was due to the fact that the market viewed Videolan as a stock worthy of investment. That is the principal reason why the stock went from an opening day price of $8.00 to nearly $48.00 over the course of time.

The fatal flaw in the government's loss calculations is that it attributes the entire decline in Videolan stock price to Newman's pre-selling of the aftermarket. In reality, however, the stock price declined because Videolan's product never realized its potential. In other words, the stock plummeted from a high of approximately $48.00 per share to a low of approximately $2.50 because the company's teleconferencing monitor did not function as advertised by the Company's principals. The decline in price reflected the "street's" lack of faith in the company – not Newman's pre-aftermarket conduct.

## APPENDIX G

### [APPELLATE COUNSEL'S LETTER TO SECOND CIRCUIT]

June 30, 2003

Hon. Sonia Sotmayor, C.J.
Hon. Robert D. Sack, C.J.
Hon. George B. Daniels, D.J.
United States Court of Appeals
For the Second Circuit
40 Centre Street
New York, New York 10007

Re: United States v. Michael Newman
02-1469

Your Honors:

This Letter is respectfully submitted to provide the Court a record reference that was requested at oral argument on June 2, 2003. The question was posed of undersigned counsel where within the record trial counsel for Mr. Newman addressed the sentencing arguments made on appeal. The reference is: Defendant Newman's Memorandum of Law in Response to the Government's Revised Sentence Posture at 1-6. These same issues were raised throughout Mr. Newman's Fatico hearing testimony on July 26, 2002.

Thank you.

Respectfully submitted,

/s/ Gerald B. Lefcourt
Gerald B. Lefcourt
Attorney for Michael Newman

GBL:rl
cc: AUSA Carolyn Pokorny